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## BETWEEN THEORY AND PRACTICE: NEW PERSPECTIVES ON THE ROMAN LAW OF LETTING AND HIRING

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## BETWEEN THEORY AND PRACTICE: NEW PERSPECTIVES ON THE ROMAN LAW OF LETTING AND HIRING

PAUL DU PLESSIS\*

### I. INTRODUCTION

JURISTIC writing and Imperial Constitutions on the subject of *locatio conductio*, collected by the compilers to produce D.19.2 and C.4.65, do not present a complete picture of the Roman law of lease. Not only were most of these texts severed from their original context, but the statements in the Introductory Constitutions to different parts of the *Corpus Iuris Civilis* also indicate that a large number were eliminated in the compilation process. Although it can hardly be disputed that what the compilers chose to include in these two titles was an accurate account of the law of letting and hiring in force during the time of Justinian, it has been credibly suggested that these titles were given a specific focus in order to project a particular image of the Roman rental economy.<sup>1</sup> Whether one accepts this hypothesis or not, it cannot be disputed that the two titles on *locatio conductio* are mainly concerned with agricultural tenancy rather than other forms of lease. An argument could of course be made that this particular focus merely reflects the importance of land in the Roman economy, but it fails to explain why other equally (if not more) profitable forms of lease receive such scant treatment. One of the consequences of the pre-eminence of agricultural tenancy in D.19.2 and C.4.65 is that certain forms of lease are merely mentioned in passing. A prime example of this is the letting and hiring of warehouses. Although it is clearly a form of *locatio conductio rei* and was therefore governed by the same legal rules which applied to the any form of lease of movable or immovable property mentioned in the legal sources, it had certain legal peculiarities which set it apart from other forms of lease. Until recently, information about the letting and hiring of

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<sup>1</sup> D.P. Kehoe, *Investment, Profit and Tenancy—The Jurists and the Roman Agrarian Economy* (Ann Arbor, Michigan 1997), ch. 3. G. Diódsi, *Contract in Roman Law: from the Twelve Tables to the Glossators* (Budapest 1981), p. 65 argues that in Justinianic law: “*colonatus* had come into general use in the East, as well, [but] the contract of letting and hiring does not seem to have been pushed into the background”.

warehouses was based on a small number of legal texts augmented by a few epigraphic inscriptions which were widely discredited.<sup>2</sup> Since then, the discovery and publication of the Murecine archive of the *Sulpicii* have brought to light two new *tabulae* dealing with the letting and hiring of warehouses. While these have been treated extensively in the context of money lending, proper attention has not been given to them in the context of *locatio conductio* as examples of the written embodiment of a contract of lease (*lex locationis*).<sup>3</sup>

This article will examine these two documents in the light of existing knowledge about letting and hiring of warehouses. It will argue that they provide a new perspective on this form of lease that necessitates a substantial reinterpretation of existing views on the matter. This will, in turn, contribute to the ongoing debate about the extent to which Roman law is a product of the society that created it as well as the larger issue of the relationship between legal theory and legal practice.<sup>4</sup> The argument will be developed in three stages. First, an overview of the law governing the letting and hiring of warehouses will be supplied. Thereafter, the information provided by the newly discovered Murecine tablets will be analysed in light of existing knowledge of this form of lease. For the sake of the argument, a distinction will be drawn between state-owned and privately-owned warehouses. Finally, some conclusions will be drawn.

## II. WAREHOUSES AND THE LAW

Any discussion of warehouses has to take account of their place and function within Roman commerce.<sup>5</sup> Warehouses were economic assets with income-generating potential that were administered by their owners using a variety of management devices. Legal evidence suggests that the owners of warehouses were generally not directly

<sup>2</sup> Warehouses (*horrea*) are mentioned in the following texts, D.19.2.60.9; D.19.2.60.6; D.36.4.5.22; D.20.4.21.1; D.20.2.3; D.19.2.56; D.14.5.8; D.10.4.5pr; D.9.3.5.3; D.5.1.19.2; C.4.65.1. See comprehensively G. Rickman, *Roman Granaries and Store Buildings* (Cambridge 1971) for a discussion of the epigraphic sources.

<sup>3</sup> On the treatment of these texts in the context of money lending, see, e.g., J. Macqueron, "Deux Contrats d'Entrepôts du 1<sup>er</sup> Siècle ap. J.C. T.Pomp. 7 et 44", in *Études Offertes à Pierre Kayser* vol. 1–2 (Aix-en-Provence 1979), pp. 199–212; and generally J.A. Crook and J.G. Wolff, *Rechtsurkunden in Vulgarlatein aus den Jahren 37–39 N.Chr.* (Heidelberg 1989), pp. 20–21.

<sup>4</sup> There are two camps within this debate. On the one hand, J.A. Crook, *Law and Life of Rome, 90 B.C.–A.D. 212* (New York 1976), ch. 1, has argued that a close relationship exists between Roman law and Roman society and that much of Roman law can be explained in terms of societal structures. A. Watson, *Legal Transplants* (Edinburgh 1974) has taken a more cautious view. While Watson does not dispute the existence of a certain link between Roman law and its society, he points out that the precise nature of the link is often obscure and cannot be used in all cases to explain the existence of certain rules of law.

<sup>5</sup> For a comprehensive survey of academic literature on this topic, see A. Wacke, "Rechtsfragen der römischen Lagerhausvermietung" (1980) 26 *Labeo* 299.

involved in their daily running.<sup>6</sup> The most common forms of warehouse management involved either the use of slaves or contractual middlemen. The latter seems to have been particularly popular, judging by the number of legal texts devoted to it in the context of the law of letting and hiring. The structure outlined in these texts involves three parties, namely the warehouse owner (*dominus horreorum*) (who could be either an individual or a *procurator* acting on behalf of the Roman state or a local municipality), the *horrearius* (contractual middleman) and the customers who used the warehouse for storage and safekeeping of goods.<sup>7</sup> The *horrearius* rented the entire warehouse from the owner with the aim of producing economic profit by subletting spaces within it at a higher cost to his customers. It is interesting to note that this three-tiered structure also occurs in other commercial ventures in Roman law, namely the lease of tenement buildings and was, as has been argued elsewhere, devised to devolve legal (not to mention financial) responsibility away from the owner and onto the contractual middleman.<sup>8</sup> Thus, the management of warehouses using contractual middlemen in Roman law was dealt with under the heading of the law of letting and hiring.<sup>9</sup>

*Locatio conductio* was a consensual contract that could be concluded by agreement alone supported by the *fides* of both parties.<sup>10</sup> In classical Roman law, agreement could take any form whether through verbal negotiations between the parties or by messenger. A written embodiment of the agreement was not required by law. Evidence suggest, however, that the practice of recording the terms of an agreement of lease in a so-called *lex locationis* became widespread towards the end of the classical period, and a number of Roman legal texts are clearly concerned with the interpretation of specific provisions forming part of such a written *lex*.<sup>11</sup> The evidentiary value of the written document remains uncertain, but it may be assumed that it could at best be used as evidence of the agreement which constituted the *fides* on which the contract was based.<sup>12</sup> Little is known about the details of

<sup>6</sup> This is confirmed by the two tablets in question. See also Rickman, *Roman Granaries*, p. 195.

<sup>7</sup> Wacke, (1980) 26 *Labeo* 299, pp. 301–2.

<sup>8</sup> P.J. Du Plessis, *Janus in the Roman law of Urban Lease* (2006) 55 *Historia* 58.

<sup>9</sup> Greco-Egyptian law dealt with the matter differently, see Macqueron, “Deux Contrats d’Entrepôts” (note 3 above), p. 209.

<sup>10</sup> See Paul’s statement in D.19.2.1 and *Epitome Gai* 2.19.5.

<sup>11</sup> See D.19.2.25.3–4; D.19.2.11.1; D.19.2.29 and D.19.2.30.4.

<sup>12</sup> Cf. the following statement in the context of agricultural tenancy: “[I]t does not appear that the *lex* had of necessity to be in writing. Although modern studies are not explicit on this point, this must follow from the nature of the *lex*: clauses that became binding on the conclusion of the contract. If this could be effectuated consensually, the same must have obtained for the *lex*. The only condition must have been that the clauses were made known to the *conductor*, but there are no grounds for assuming that they therefore had to be in writing—the less so since undoubtedly the *conductores* could often barely read”. P.W. De Neeve,

the agreement between the warehouse owner and the *horrearius*, since an example of such a contract has not survived.<sup>13</sup> At most it may be assumed that the agreement would have been governed by the rules of *locatio conductio rei* in Roman private law where the warehouse owner was an individual.<sup>14</sup> The main aim of this contract would have been to produce profit for the *horrearius* and it seems likely that the warehouse would have been let on these terms (*fruenda locata*).<sup>15</sup> Apart from that, however, virtually nothing is known about the actual terms of such an agreement. There is one legal text that addresses an issue which may have formed part of the terms of an agreement between these parties. A text by the jurist Labeo, D.19.2.60.9, states that the *dominus horreorum* generally was not liable for *custodia* towards his *horrearius*, unless the parties had made an alternative arrangement.<sup>16</sup> This would suggest that where the parties made another arrangement about the extent of their contractual responsibilities, it would have had to be included in terms of their agreement.

It is not the intention of this article to enter into the academic debate about *custodia*, since much remains disputed, but a brief comment on the above-mentioned text is required. *Custodia*, as a legal term, is a controversial matter as it is not used consistently in Roman legal texts. Where the term is used as a standard of contractual liability, it refers to the debtor's obligation to guard the object belonging to the creditor. It also includes liability for theft which, according to some scholars is absolute while others argue that a degree of negligence on the part of the debtor is required. Matters are complicated further by the fact that *custodia* as a standard of liability was abolished in Justinianic law (replaced by *culpa in custodiendo*) and therefore many of the texts seem to have been altered by the compilers to reflect this change. *Custodia* was not the general standard of liability in the contract of letting and

*Colonus: Private Farm—Tenancy in Roman Italy during the Republic and the Early Principate* (Amsterdam 1984), I. 3. On the evidentiary value of written documents in Roman courts, see E.A. Meyer, *Legitimacy and Law in the Roman World: Tabulae in Roman Belief and Practice* (Cambridge 2004), ch. 8.

<sup>13</sup> Rickman, *Roman Granaries*, p. 196 notes that the duration of such a contract was usually five years.

<sup>14</sup> Roman citizenship was never an issue in the law of letting and hiring as it was “*naturalis ... et omnium gentium*” according to Paul in D.19.2.1. Thus non-citizens and foreigners could be party to contracts of lease as well.

<sup>15</sup> Cf. C.4.65.6 and on the meaning of the term “*fruenda locata*” see P.J. Du Plessis, *Subletting and the Roman law of Letting and Hiring: Interpreting C.4.65.6*, in *European Legal Community: Traditions and Perspectives* (Warsaw 2006) (forthcoming).

<sup>16</sup> D.19.2.60.9 *Labeo posteriorum libro quinto a Iavoleno epitomatorum* *Rerum custodiam, quam horrearius conductoribus praestare deberet, locatorem totorum horreorum horreario praestare non debere puto, nisi si in locando aliter convenerit*. On this point, see comprehensively, Rickman, *Roman Granaries*, p. 205 and R. Robaye, *L'Obligation de Garde. Essai sur la Responsabilité Contractuelle en Droit Romain* (Brussels 1987).

hiring. In classical Roman law, the *conductor* was liable only for *dolus* and *culpa*, but in some instances an additional liability of *custodia* was imposed.<sup>17</sup> Most of these cases may be classified as *locatio conductio operis* which involved the production of some result using material owned by the *locator* (*fullo, sarcinator*). With that said, it seems strange that Labeo (epitomised by Iavolenus) would make the statement in D.19.2.60.9 that a *dominus horreorum* was not liable for *custodia* towards the *horrearius*, but that the latter was liable to that standard towards his *conductores*. It is hard to envisage a case where the *dominus* would ever be liable for *custodia* towards the *horrearius*. The reason for this rather curious statement may be twofold. First, assuming that *custodia* as a standard of contractual liability incorporated an absolute liability for theft irrespective of whether the debtor was negligent, it may be that the jurists were trying to reinforce the point that any loss suffered by the *conductores* through theft, for which the *horrearius* was liable, could not be transferred in some way to the *dominus horreorum* via his custodial liability towards the *horrearius*. Second, it may well be that there was some dispute among the jurists about the nature of the agreement between the respective parties (*dominus horreorum*—*horrearius*—*conductores*) and that some of them wished to assign *custodia*, visible in some cases of *locatio conductio operis*, to both sets of contracts. Some support for this is to be found in Lenel's reconstruction of Iavolenus' epitome of Labeo's work where the text immediately preceding D.19.2.60.9 (D.19.2.59) concerns an example of *locatio conductio operis* where performance had been rendered impossible by *vis maior*.<sup>18</sup> Since *vis maior* was the only ground upon which liability for *custodia* could be evaded, an argument could be made that this was the subtext of the discussion.

Even less is known about the agreement between the warehouse owner and the *horrearius* where the warehouse was owned by the state or a local municipality. It is, for example, difficult to establish whether this kind of agreement would have been governed by Roman private law. Suffice it to say that there are suggestions that legal rules similar to those governing *locatio conductio rei* in Roman private law may have governed these contracts as well.<sup>19</sup>

The nature of the agreement between the *horrearius* and his customers who left goods in the warehouse for safekeeping long remained controversial. From early on in the scholarly debate it was agreed that these contracts could not have been that of

<sup>17</sup> For a summary of the controversy, see R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford 1996), p. 376.

<sup>18</sup> O. Lenel, *Palingenesia Iuris Civilis* 2 vols. (Graz 1960) I, p. 310–11 (texts 211, 212).

<sup>19</sup> See D.8.5.8.5; D.32.30.1.

*depositum*, since the latter was essentially gratuitous and the legal texts mention that individuals paid for the safekeeping of their wares.<sup>20</sup> It was furthermore accepted that these contracts had to be that of *locatio conductio*, but scholars could not agree on the type of lease in terms of the modern trichotomy imposed upon it. Thus it was fiercely debated whether these contracts should be classified as *locatio conductio operarum*, *locatio conductio operis* or even a combination of *locatio conductio rei* and *operis*.<sup>21</sup> The current view on the nature of this contract is that proposed by the late Professor Thomas in his 1966 article on the matter.<sup>22</sup> Although he was critical of the modern trichotomy imposed on *locatio conductio*, he argued, based on an analysis of the legal texts, that the contract between the *horrearius* and his customers could be nothing other than *locatio conductio rei*.

### III. STATE-OWNED WAREHOUSES

Information about the letting and hiring of state-owned warehouses is almost exclusively based on the so-called *lex horreorum caesaris*, a marble tablet of 98 cm × 88 cm discovered in 1885 near the *Porta Salaria* in the North of Rome.<sup>23</sup> It has been published with a number of possible reconstructions, but as Geoffrey Rickman observed in his 1971 book on Roman granaries: “there is enough agreement concerning the sense, if not always concerning the wording, of the inscription, to extract much information about the conditions listed”.<sup>24</sup> It is generally agreed that this inscription dates from the reign of the Emperor Nerva (96–98 AD).<sup>25</sup> The text contains a number of legal rules concerning the letting of spaces within a warehouse.<sup>26</sup> Apart from certain practical issues relating to

<sup>20</sup> See Wacke, (1980) 26 *Labeo*, p. 307 for a survey of the debate.

<sup>21</sup> See F. Wubbe, “Zur Haftung des Horrearius” (1959) 76 *Z.S.S. (R.A.)* 508; J.A.C. Thomas, “*Custodia* and *Horrea*” (1959) 6 *R.I.D.A.* 371; C.A. Cannata, “Su alcuni Problemi Relative alla ‘Locatio Horrei’ nel Diritto Romano Classico” (1964) 30 *S.D.H.I.* 235; J.A.C. Thomas, “Return to *Horrea*” (1966) 13 *R.I.D.A.* 353, p. 362; Wacke, (1980) 26 *Labeo* 299, p. 308; and an overview in Zimmermann, *Obligations*, p. 346 note 37 with literature.

<sup>22</sup> “In view of my previous oscillation between *locatio rei* and *locatio operis faciendi*, it is perhaps right that I should now state firmly my belief that—if indeed we have to adopt one of the modern categories—it would be *locatio rei*; the uniformity of the language of the texts which say that *horrearius locat* leaves no doubt that the depositor is a *conductor*. I say, if we must adopt one of the modern categories, because it seems to me that the case of the *horrea* contract is really another confirmation that the Romans did not employ our scheme”. Thomas, (1966) 13 *R.I.D.A.* 353, p. 362.

<sup>23</sup> See Rickman, *Roman Granaries*, pp. 198–9.

<sup>24</sup> Rickman, *Roman Granaries*, p. 199.

<sup>25</sup> S. Riccobono et al. (eds.) *Fontes Iuris Romani Antejustiniani* 3 vols. (Florence 1940–43), III, p. 455.

<sup>26</sup> [In his h]orreis [Imp(eratoris)—C]aesaris Aug(usti) loc(antur) [mercatoribus frumen]ar(iis) armaria et loca [cum operis cella]r(arum) ex hac die et ex [k]alendis Ianuariis].  
Lex horreorum.

[Quisquis in annum futurum retinere volet quod conduxit armarium aliud]ve quid, ante idus Dec(embres) pensione solute renuntiet. Qui non [renuntiaverit, si volet retinere et cum horreario



the payment of rent and the obtaining of a receipt, the majority of the rules of law contained in it, *e.g.*, the right to sublet, the liability for *custodia* and the tacit lien over *inventa et illata* brought into the warehouse by *conductores* are corroborated by legal texts in the Digest and the Code.

Since then, a new piece of evidence forming part of the Murecine archive has come to light. It is a document recording a *lex horreorum* of spaces within a state-owned warehouse (TPSulp. 45).

C(aio) Caesare Germanico Augusto Ti(berio) Claudio Nerone Germanico co(n)s(ulibus), sextum nonas Iulias (2 July 37 AD). Diognetus C(aii) Novi Cypaeri servus scripsi iussu Cypaeri domini mei coram ipso me locasse Hesychos Ti(berii) Iulii Augusti l(iberti) Eueni ser(vo) horreum duodecimum in horreis Bassianis publicis Puteolanorum mediis, in quo repositum est triticum Alexandrinum, quod pignori accepit hac die a C(aio) Novio Euno, item in iisdem horreis imis intercolumnia, ubi repositos habet saccos leguminum ducentos, quos pignori accepit ab eodem Euno. Ex k(alendis) Iuliis in menses singulos sestertiis singulis n[um]m(is). Act(um) P[ro]u[er]b(eolis).<sup>27</sup>

Under the consuls Gaius Caesar Germanicus Augustus and Tiberius Claudius Nero Germanicus on the 6th day before the *Nones* of July (2 July 37), I, Diognetus, slave of Gaius Novius Cypaerus, have written with the authorisation of my master Cypaerus and in his presence that I let to Hesychus, slave of Tiberius Iulius Euenus, freedman of Augustus, stall 12 on the middle floor of the Bassian Public Granaries of the Puteolans, in which Alexandrian wheat is stored, which (Hesychus) receives as a pledge today from Gaius Novius Eunos, likewise in the same granaries the lower floor between the columns, which holds in storage 200 sacks of beans, which (Hesychus) receives as a pledge from the same Eunos. From the Kalends of July (1 July) one sesterce each month. Transacted at Puteoli.<sup>28</sup>

Although this tablet predates the *lex horreorum caesaris* by roughly 60 years and comes from a town in Italy, there is no evidence to

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*aliter pro ñnsequente anno non transegerit, tanti habebit, quanti eius gener(is) [armarium eo anno ibi locari solebit, si modo ali locatum n]on erit.*

Quisquis in his horreis conductum habet, elocandi et [substituendi ius non habebit. Invectorum in haec horrea custodia non praestabitur. Quae in his horreis inventa inlata [erunt, pignori erunt horreario, si quis pro pensionib]us satis ei [non fecer]it. Quisquis in his horreis conductum habet et sua [...] fuer(it) venia.

[Quis]quis in his horreis conduct(um) habet pensione soluta chirogr(apho) [liberabitur ...

Quisquis habens conductu[m] horreum su[a] ibi] reliquerit et custodi non adsignaver(it), horrearius sine culpa erit.

Reconstruction taken from *FIRA* III, pp. 455–6. For alternatives, see Rickman, *Roman Granaries*, pp. 198–200.

<sup>27</sup> Reconstruction taken from G. Camodeca, *Tabulae Pompeianae Sulpiciorum* (TPSulp.): *Edizione Critica dell'Archivio Puteolano dei Sulpicii*. 2 vols (Rome 1999), p. 122.

<sup>28</sup> Translation by G. Rowe, *The World of the Murecine Archive* (<http://www.unine.ch/antic/RoweFNSRS.htm>) TPSulp Translation, p. 8.

suggest a deviation in legal practice either geographically or temporally. To understand the importance of this tablet and its relationship to the *lex horreorum caesaris*, the events described in it and their wider context have to be understood. Gaius Novius Cypaeus was a *horrearius* who had rented the entire Bassian Public Granary from the city of Puteoli with the aim to sublet individual spaces for profit. The running of the warehouse was assigned to his slave, Diognetus. One of his customers, Gaius Novius Eunus owned a certain amount of wheat which he had previously stored in the Bassian Public Granaries. For reasons not mentioned in this tablet (but evidenced by TPSulp. 51–2), Eunus needed to borrow money and approached a moneylender, Tiberius Iulius Evenus, for a loan. The latter, acting through his slave Hesychus, agreed to lend Eunus the money but requested that he provide real security to ensure the repayment of the loan. Eunus volunteered his wheat stored in Bassian Public Granaries. To ensure possession of the wheat (a pledge), Evenus, using his slave Hesychus, “took over” the lease of the grain stall. Evenus could not merely assume Eunus’s position as *conductor* since Roman law was uncomfortable with the substitution of contracting parties and a new contract of lease therefore had to be made. This document records a *lex locationis* detailing the second contract of lease.

This tablet is significant for a variety of reasons. Not only does it provide useful information on the practice of money lending, but it also contains invaluable insight into the nature of *locatio conductio* in the context of the letting and hiring of warehouses. The wording of the document confirms that the contract between a *horrearius* (acting *via* a slave) and a *conductor* (also acting *via* a slave) was one of letting and hiring. The use of the formula “*scripsi me locasse*” and its accusative *horreum duodecimum* furthermore resolves the issue about the type of letting and hiring. As Professor Thomas had rightly postulated, it was clearly an example of *locatio conductio rei*.<sup>29</sup> More importantly, however, it is quite clear that the contract of letting and hiring also served another purpose in this tablet. It was not merely aimed at securing a space within the warehouse in which to deposit goods for safekeeping, since the wheat was already in storage there. Rather, the aim of the contract was to ensure that the creditor obtained and retained possession (in both a practical and legal sense) of the wheat pledged as security for the repayment of the loan. This is a singular application of the contract of lease that is merely hinted at in the legal sources (*e.g.*,

<sup>29</sup> Cf. note 22 above.

D.20.4.21.1) and for which this document now provides conclusive evidence. This text requires some analysis:

D.20.4.21.1 *Scaevola libro vicesimo septimo digestorum* Negotiatori marmorum creditor sub pignore lapidum, quorum pretia venditores ex pecunia creditoris acceperant: idem debitor conductor horreorum Caesaris fuit, ob quorum pensiones aliquot annis non solutas procurator exactioni praepositus ad lapidum venditionem officium suum extendit: quaesitum est, an iure pignoris eos creditor retinere possit. Respondit secundum ea quae proponerentur posse.

A loan was made to a marble dealer subject to a pledge of the marble slabs, the sellers of which had been paid with the creditor's money. The debtor was also a lessee of an Imperial warehouse, rent for which had not been paid for a number of years. The Imperial procurator claimed to sell the slabs in pursuance of his duty to exact payment. The question was put whether the creditor could retain them by way of a pledge. Scaevola replied that according to the facts stated he could.

A marble dealer bought slabs of marble with money borrowed from a third party (possibly a money-lender). The third party lent the money to him on condition that he could secure a pledge over the marble slabs to ensure payment of the loan. The slabs were stored in a state-owned warehouse in which the marble dealer had previously rented some space. He had not paid the rent for these stalls for some time and at some later point the *horrearius* (Imperial procurator) decided to enforce his tacit lien over the goods stored by the marble dealer in order to sell them to recover the rent owed.<sup>30</sup> The question was put to Scaevola whether the *horrearius* should succeed with his claim or whether the creditor should be able to counteract this claim based on his pledge over the slabs. Since the text has been stripped of its context, much of the crucial detail remains obscure. It is, for example, unclear whether the creditor "took over" the lease of the space within the warehouse to obtain possession of the marble slabs as is evidenced by the practice described in the Murecine tablets. It is proposed that, given Scaevola's conclusion, this could very well have been the case. The *horrearius'* tacit lien over the good stored in the warehouse was clearly *prior in tempore*, since the text mentions that rent had been owed for a number of years before the transaction involving the marble slabs occurred.<sup>31</sup> Notwithstanding that, however, Scaevola argued that on the facts stated, the creditor's

<sup>30</sup> Goods stored could not be confiscated at will to recover rent due. Roman law mentions a specific legal procedure that had to be followed when opening up rented store-rooms for the sake of attaching the goods stored there to recover the rent due: see D.19.2.56.

<sup>31</sup> It may have been that there was nothing of value housed within the rented space that could be attached to recover the rent due prior to the marble slabs being deposited there.

claim over the marble slabs, based on pledge, was *potior in iure* and therefore had to succeed. This might very well have been the motivation for using lease to secure possession of goods used as a pledge in a larger commercial transaction.

Returning to the analysis of TPSulp. 45, it seems safe to assume that this type of lease would have been of short duration, *i.e.*, until the loan had been repaid. What happened after repayment remains unclear, but presumably the owner of the wheat, Eunus, would have entered into a new contract with the *horrearius* for the lease of the same grain stalls in which the wheat was stored unless, of course, the wheat had by that time already been used as security for another loan.<sup>32</sup>

Another notable observation relates to the nature of the tablet as a *lex locationis*. It was the written embodiment of an agreement between the *horrearius* and the *conductor* both acting *via* their slaves. Except for the explicit attention in the document to the *iussum* of the respective owners for reasons of contractual liability, it shows how formless the consensual contract of lease was. The only *essentialia* mentioned are the formula “*scripsi me locasse*”, the object of lease and the price. But this apparent freedom of form is not the only noteworthy element of the document. The absences are in fact more extraordinary. Compared to the *lex horreorum caesaris* mentioned above, the lease recorded in this tablet contains none of the technical rules of law mentioned there. A number of reasons have been proposed for this apparent discrepancy ranging from the purpose of the lease in this case to the nature of the Murecine tablets themselves. Gregory Rowe has, for example, argued that these tablets were in a sense “subjurisprudential” either because the slaves who were charged with recording them did not have detailed knowledge of the law or because their masters did not consult a jurist on the finer legal points in every case.<sup>33</sup> While this may be true for other texts in the Murecine archive, it is not the case for the two documents recording *leges locationis*. Apart from the fact that the object of lease was vaguely described in TPSulp. 45, there is nothing legally objectionable about the contract. The only anomaly is that it does not mention the detailed rules of law visible in the *lex horreorum caesaris* and this may be explained in terms of the nature of the two documents.<sup>34</sup>

<sup>32</sup> It seems implausible that the notion of a revolving stock existed in Roman law as it is not supported by the evidence.

<sup>33</sup> G. Rowe, *The World of the Murecine Archive: Business* (<http://www.unine.ch/antic/RoweFNSRS.htm>).

<sup>34</sup> This point has been tentatively made by Wacke, (1980) 26 *Labeo* 299, pp. 310 and 318, but has not been fully explored.

Although the *lex horreorum caesaris* was clearly a *lex* in the technical sense of the word, it was clearly not a contract in the private-law sense between the representative of the state and the *horrearius*. This is evident not only from the nature of the inscription, but also from the absence of any references to parties, delivery dates and signatures. Rather, it was a set of general legal rules that were probably drafted to define the parameters of the *horrearius*' commercial exploitation of the warehouse or, in other words, the *result* of the contract between the *procurator* and the *horrearius* rather than the contract itself.<sup>35</sup> Furthermore, judging by the nature of the inscription (a marble tablet), it seems safe to assume that it was constructed to be prominently displayed in the warehouse for all to see.<sup>36</sup> How these statements in the *lex horreorum caesaris* would have interacted with individual contracts such as the one recorded in TPSulp. 45 is unclear. The nature of the legal rules contained in *lex horreorum caesaris* may provide some answer.

Apart from practical rules relating to the date of payment and the obtaining of a receipt, the *lex horreorum caesaris* mentions three legal rules, namely the right to sublet, the *horrearius*' liability for *custodia* and his tacit lien over movables (*invecta et illata*) brought into the warehouse. A survey of Roman legal texts demonstrates that these were all implied contractual clauses. The right to sublet was presumed to exist unless the parties to the contract had made an alternative arrangement.<sup>37</sup> The *horrearius* (not the *dominus horreorum*) was liable for *custodia* unless the parties had made an alternative arrangement.<sup>38</sup> The *horrearius*' tacit lien over movables brought into the warehouse was said to be based on a *tacita conventio*.<sup>39</sup> This would explain why these provisions do not occur in the *lex locationis* from the Murecine archive. Since they were implied, all agreements that a *horrearius* entered into with individual *conductores* would have been subject to them *ipso iure*. These clauses need not have been expressly mentioned or even incorporated in the contracts. It was presumably only where the parties chose to deviate from them, that it had to be mentioned in the contract. To ensure an element of publicity (no doubt to satisfy

<sup>35</sup> See Wacke, (1980) 26 *Labeo* 299, p. 316.

<sup>36</sup> Cf. the provision in chapter 63 of the *Lex Malacitana* (FIRA I, p. 215) where it is clearly stated that information about state leases have to be displayed "in such a way that they can be read from ground level, in a place in which the *decuriones* or *conscripti* decide that they should be displayed".

<sup>37</sup> C.4.65.6 Imp. *Alexander A. Lucilio Victorino* Nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud conventit [a. 224].

<sup>38</sup> D.19.2.60.9, quoted in note 16 above.

<sup>39</sup> D.20.2.3 *Ulpianus libro septuagesimo tertio ad Edictum* Si horreum fuit conductum vel devorsorium vel area, *tacitam conventionem* de invectis illatis etiam in his locum habere putat Neratius: quod verius est.

the *fides* of the contract), they were publicly displayed as demonstrated in the *lex horreorum caesaris*.

This example of a *lex locationis* from the Murecine archive therefore provides the pivotal counterbalance to the *lex horreorum caesaris* in that it demonstrates the Roman attitude towards implied conditions in law. It also sheds significant light on the practice of letting and hiring of warehouses. In state-owned warehouses a set of legal rules would have been drafted and displayed prominently. They were implied by law and therefore governed all contracts entered into between *horrearius* and his *conductores*. The contracts themselves could be quite short and need not contain anything apart from the *essentialia* required for *locatio conductio rei*.

#### IV. PRIVATELY-OWNED WAREHOUSES

Knowledge about the letting and hiring of privately owned warehouses is even more fragmentary as very few legal sources exist on the subject. In terms of the legal structure outlined above, the only real difference between state-owned and privately-owned warehouses is that in the latter case the *dominus horreorum* would have been an individual and that the contract of lease between the *dominus horreorum* and the *horrearius* would have been governed by the rules of *locatio conductio rei* in Roman private law. There is evidence to suggest that the legal practice concerning the letting and hiring of privately owned warehouses was similar to that followed in state-owned warehouses. A mutilated inscription, dating from the second century AD, discovered in 1910 on the Aventine, records legal rules relating to the privately owned Ummidian warehouses.<sup>40</sup> Although much shorter than the *lex horreorum caesaris*, it contains similar rules of law relating to the tacit lien over movables brought into the warehouse as well as the conductor's *ius tollendi* for permanent alterations made to individual spaces. This seems to suggest that much of the private-law rules concerning the letting and hiring of warehouses applied in public law as well. These may also be classified as implied contractual provisions and an argument could therefore be made that this epigraphic inscription fulfilled the same function as the *lex horreorum caesaris*, namely a summary of the legal parameters within which the *horrearius* was permitted, by virtue of his

<sup>40</sup> [In his horr]eis Umm[idianis singulis an]nis locan[tur horrea apothecae comp]lendiaria ar[maria intercolumnia et loc]a ex hac d[ie] et ex kalendis Iuliis. Quae in his horreis i[n]vecta inla[ta] importata erunt, horreario pig[nori] erunt d[onec] satis ei factum non sit aut pens[i]o solvatur. S[i] quid in his horreis conductor in]aedificaverit, [tollendi ius non habebit, nisi dat]a ei reficiendi po[restas fuerit ...] idie [...]. Reconstruction taken from *FIRA* III, p. 457.

agreement with the *dominus horreorum*, to utilise the warehouse for commercial purposes.

Earlier in this article it was argued that these inscriptions interacted with individual contracts on the basis of the implied contractual conditions contained in them. Individual contracts between the *horrearius* and his customers did not need to contain any explicit mention of the rules of law stated in the *lex horreorum* since all contracts were regarded as being tacitly subject to them. That this practice was also followed in the letting and hiring of privately owned warehouses seems to be confirmed by a second tablet from the Murecine archive (TPSulp. 46).

C(aio) Laecanio Basso Q(uinto) Ter[en]tio Culleone co(n)s(ulibus), III i[du]s Martias (13 March 40 AD). Nardus P(ubl[i]i) Anni Seleuci servus sc[ri]psi coram et iussu Sel[eu]ci domini mei, [q]uod is negaret se litteras scire, m[e] locasse C(aio) Sulpicio Fausto horreum vicensimum et sexstum, quod est in praedis Domitiae L[e]pidae B[a]rbatianis superioribus, in quod respositum est tritici Alexandrini millia mod[iu]m decem et tria, [quae] admetietur dominus meus cum s[er]vis [sui]s, m[er]c[ed]e in mensibus singulis sestertis centenis nummis. Actum Puteolis.<sup>41</sup>

Under the consuls Gaius Laecanius Bassus and Quintus Terentius Culleo on the third day before the *Ides* of March (13 March 40), I, Nardus, slave of Publius Sulpicius Seleucus, have written in the presence of and with the authorisation of my master Publius Annius Seleucus, because he says that he is illiterate, that I let to Gaius Sulpicius Faustus grain-stall 26, which is in the upper storeys of the Barbatians in the estates of Domitia Lepida, in which are placed 13000 *modii* of Alexandrian wheat, which my master will measure out with his slaves, with HS 100 in cash each month as a commission. Transacted at Puteoli.<sup>42</sup>

This tablet records a contract between a *horrearius* of a privately-owned warehouse, Publius Sulpicius Seleucus (again acting *via* a slave, Nardus) and an individual *conductor* (Gaius Sulpicius Faustus) relating to a grain-stall. As in the previous case, certain background information needs to be assumed.<sup>43</sup> A third party, Lucius Marcus Iucundus owned a certain amount of wheat which he had stored in the warehouse in question. He needed to raise a loan and approached a moneylender, Faustus. To ensure repayment of the loan, Faustus secured a pledge over Iucundus' wheat by "taking over" the lease of grain-stall 26. This involved entering into

<sup>41</sup> Reconstruction taken from Camodeca, *Tabulae Pompeianae Sulpiciorum*, p. 125.

<sup>42</sup> Translation by G. Rowe, *The World of the Murecine Archive* (<http://www.unine.ch/antic/RoweFNSRS.htm>) TPSulp Translation, p. 9.

<sup>43</sup> For background information, see TPSulp. 53 and 79.



a new contract of lease with the *horrearius* and it is this contract which is recorded in the tablet in question.

Although there is no direct relationship between the *lex horreorum* of the privately owned Ummidian warehouse and the contract recorded in TPSulp. 46, it seems plausible, in light of the argument developed above, that they represent two sides of the letting practice commonly used in the letting and hiring of warehouses. As in TPSulp. 45, the absence of any mention to the technical rules of law in the contract of lease combined with the implied nature of the legal rules mentioned in the *lex horreorum* of the Ummidian warehouses suggest that these documents must have stood in a similar relationship. Furthermore, despite the fragmentary nature of the Ummidian *lex*, there seems to be a large measure of similarity between private and state practice in the letting and hiring of warehouses.

## V. CONCLUSIONS

Little was known about the letting and hiring of warehouses before the discovery of two tablets forming part of the Murecine archive. This form of *locatio conductio rei* was not treated extensively in the *Corpus Iuris Civilis* and evidence from inscriptions was widely discredited. The discovery and publication of these two contracts have provided an entirely new perspective on this form of letting and hiring and the practice that surrounded it. They demonstrate not only the extent of the formlessness of *locatio conductio rei* as a consensual contract and the similarity in legal practice in state-owned and privately-owned warehouses, but also the practice of having a fairly short contract of lease into which technical rules of law were incorporated tacitly *via* a set of legal rules displayed in the warehouse. The prevalence of this practice cannot be verified, but parallels can certainly be drawn with similar commercial ventures such as tenement buildings and may explain why the Roman jurists never bothered to discuss the terms of a contract of lease between in the primary tenant of an entire tenement and his *conductores*. Moreover, they also highlight the interaction between lease and pledge in commercial transactions. With that said, however, it is impossible to establish how prevalent the use of lease was in the context of money lending, nor can it be ascertained what percentage of customers of warehouses stored goods not only for safekeeping, but to use as real security in larger commercial transactions. Finally, these examples of Roman law in practice may also be used to draw certain conclusions about the relationship between legal theory and legal practice. These texts demonstrate



that the gulf between theory and practice was perhaps not as wide as previously assumed. The Murecine Tablets on letting and hiring of warehouses are not incompatible with the legal rules proposed in the Digest. On the contrary, the contracting parties were clearly knowledgeable of the law and took great pains to insert legal requirements such as the *iussum* into the documents. These tablets, when read with this existing inscriptions, paint a picture of a sophisticated commercial world using the existing legal mechanisms with great skill.